No. 49781-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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In re the Detention of

**Charles Urlacher,**

Appellant.

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Pierce County Superior Court Cause No. 10-2-13180-4

The Honorable Judge Ronald E. Culpepper

# Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

**BACKLUND & MISTRY**
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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## ISSUES AND ASSIGNMENTS OF ERROR

1. The order denying conditional release was entered in violation of Mr. Urlacher's Fourteenth Amendment right to due process.
2. The court's instructions to the jury failed to make manifestly clear the state's burden to prove that Mr. Urlacher's proposed plan was not in his best interests.
3. The court's instructions failed to make manifestly clear the state's burden to prove that Mr. Urlacher's proposed plan was inadequate to protect the community.
4. The court erred by refusing Mr. Urlacher's proposed instruction No. 4, outlining the *Bergen* definition of the "best interests" standard.
5. The court erred by refusing Mr. Urlacher's proposed instruction No. 5, outlining the *Bergen* definition of the phrase "adequately protect the community."
6. A reasonable juror could have interpreted the court's instructions to allow denial of Mr. Urlacher's request for conditional release based on improper factors.
7. The court's instructions did not allow Mr. Urlacher to argue his theory of the case, misled the jury, and failed to properly inform jurors of the applicable law.

> **ISSUE 1:** Jury instructions must make the law manifestly apparent to the average juror, and are insufficient if reasonable jurors could interpret them to relieve the state of its burden. Did the court's deficient instructions allow jurors to reject Mr. Urlacher's proposed LRA plan even if it was in his best interests and adequately protected the community?

8. Prosecutorial misconduct violated Mr. Urlacher's Fourteenth Amendment due process right to a fair trial.
9. The government's attorney committed misconduct that was flagrant, ill-intentioned, and incurably prejudicial.
10. The state's attorney committed reversible misconduct that created "a serious irregularity having the grave potential to mislead the jury."
11. The state's attorney improperly misstated the law.

12. After acknowledging that the *Bergen* decision is "settled law" and successfully arguing that the *Bergen* definitions should not be given to the jury, the state's attorney improperly invited jurors to apply their own definitions.

    **ISSUE 2:** It is "particularly egregious" misconduct for a government attorney to misstate the law. Did the state's attorney commit misconduct that was flagrant, ill-intentioned, and incurably prejudicial, in violation of due process, by arguing that jurors were free to apply their own definitions of the phrases "best interests" and "adequately protect the community"?

13. The state's attorney improperly appealed to the jury's passions and prejudices.

14. The state's attorney improperly "testified" to facts not in evidence.

15. After the court prohibited the state from asking Dr. Spizman if Mr. Urlacher was "grooming" the jury through his testimony, the state's attorney improperly argued that Mr. Urlacher was grooming the jury through his testimony.

    **ISSUE 3:** A government attorney commits misconduct by appealing to jurors' passions and prejudices and by arguing "facts" not in evidence. Did the state engage in reversible misconduct by improperly inviting jurors to imagine themselves as child victims of a sexual offense perpetrated by Mr. Urlacher?

16. Chapter 71.09 RCW's conditional release scheme violates substantive due process under the Fourteenth Amendment.

17. The civil commitment statute's conditional release provisions are not narrowly tailored to serve a compelling state interest.

18. The "best interest" requirement for conditional release is not the least restrictive means of achieving the state's interest in treating detainees and protecting the public.

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19. The Court of Appeals should decline to impose appellate costs, should the state substantially prevail and request such costs.

**ISSUE 5:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Urlacher is indigent?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sixty-four-year-old Charles Urlacher arrived at the Special Commitment Center (SCC) in 2010,[1] after serving 136 months in prison. RP[2] 27-28. Together, he and his wife had groomed and sexually assaulted several children, including their own sons. RP 30, 44-78, 101.

While at SCC, Mr. Urlacher engaged in treatment and made substantial progress toward conditional release. RP 121-122, 408-503, 744-771. At a show cause hearing, his attorney Kelsey Page presented a less restrictive alternative (LRA) plan which included a well-respected evidence-based treatment program. RP (12/11/15) 23; CP 109-231.

The court scheduled a conditional release trial. RP (12/11/15) 25-29; CP 267-270. At the trial, the jury would have to address two issues: (a) whether the LRA plan was in Mr. Urlacher's best interests, and (b) whether it was adequate to protect the community.

Pretrial litigation focused on these issues. Ms. Page based her arguments on the only published opinion addressing the best interests and community protection elements. RP (9/27/16) 78; CP 420-427; *see In re Det. of Bergen*, 146 Wn. App. 515, 527, 195 P.3d 529 (2008). The state agreed that the *Bergen* case is "settled law." CP 474.

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[1] A commitment order was entered in 2011. RP 120.

[2] Cites to the trial will be RP. Cites to any other hearings will include the date.

Ms. Page wished to present expert testimony addressing the *Bergen* factors, and to cross-examine the state's expert on those factors. RP (9/27/16) 94-96. The state opposed this. CP 335; RP (9/27/16) 94-98. The court ruled that each expert could provide their own "working definition" of each element, but refused to allow questioning on the legal definitions. CP 507; RP (9/27/16) 97-98.

Under *Bergen,* the "best interests" standard is met when a proposed treatment plan is "the appropriate next step for [a patient's] treatment." RP (9/27/16) 78.[3] To establish that the proposed plan was the "appropriate next step" for Mr. Urlacher, Ms. Page sought to introduce expert testimony addressing differences between the SCC treatment program and Mr. Urlacher's proposed community treatment plan. RP (9/27/16) 78, 111, 113-114.

For example, the SCC program does not employ certified treatment providers, and treatment has been severely disrupted by staff shortages and high turnover. RP (9/27/16) 75, 84, 111; RP 129, 133-134, 335-336, 444-446. The court prohibited expert testimony addressing differences between the SCC treatment program and Mr. Urlacher's proposed treatment plan. RP (9/27/16) 77, 86, 113, 121.

[3] This is the language used by the *Bergen* court. *Id.,* at 529.

Mr. Urlacher's conditional release plan was admitted into evidence. Ex. 101. In support of the plan, Ms. Page introduced the testimony of Mr. Urlacher's current case manager, his proposed treatment provider, a release planning specialist, several chaperones, the Buddhist priest with whom he meditates, a leader of "Hearts for Hope" ministry, and the apartment manager where Mr. Urlacher plans to live. RP 649-787, 790-804, 825-955.

Ms. Page also presented the testimony of Dr. Paul Spizman, a clinical psychologist and certified sex-offender treatment provider who worked at the Special Commitment Center for eleven years. RP 523-526. During his tenure there, Dr. Spizman eventually rose to manage the center's forensic unit. RP 526-527.

Dr. Spizman concluded that the proposed plan was in Mr. Urlacher's best interests and that it was adequate to protect the community. RP 533, 569, 575, 579. Although he relied on the *Bergen* factors, he did not mention *Bergen's* legal framework to the jury. Instead, Dr. Spizman explained that conditional release is in a patient's best interests if the patient's treatment progress has made the patient "ready for the next step," or "ready to move on" to receive treatment in a community setting. RP 533-534. In his opinion, Mr. Urlacher is ready, and the LRA

plan will "continue to incentivize successful treatment participation." RP 575.

Dr. Spizman also outlined considerations relating to adequate community protection. These include the planned support systems, the restrictions to be imposed, and the enforcement mechanisms that will be in place. RP 575-579. After examining Mr. Urlacher's proposed plan, Dr. Spizman concluded that the plan included enough safeguards to adequately protect the community. RP 579.

The state's expert, Dr. Goldberg, "just use[d] [his] own definition" of "adequate to protect the community." RP 339. According to Dr. Goldberg, adequate community protection requires the elimination of all risk:

> Q: [I]n your interpretation of the phrase 'adequate to protect the community,' we must make it a [zero] percent risk of re-offense; is that right?
> A: Correct.
> RP 358[4]

Instead of examining the plan, Dr. Goldberg used actuarial instruments and clinical judgment to assess Mr. Urlacher's risk; based on his risk assessment, he concluded that the proposed LRA would not adequately protect the community. RP 290, 338-339.

[4] Ms. Page requested a mistrial based on this testimony. RP 404-407.

Dr. Goldberg described "best interests" as a "fairly nebulous term," and told the jury it was not defined by statute or science. RP 316. Instead, he relied on his own clinical judgment to determine that the plan was not in Mr. Urlacher's best interests. RP 290, 315-316.

Ms. Page proposed instructions defining the "best interests" and community protection elements. CP 434, 435. The proposed instructions drew language directly from the *Bergen* case. CP 434, 435.[5]

On the "best interests" issue, Ms. Page asked the court to instruct the jury "to consider whether the proposed less restrictive alternative plan properly incentivizes successful treatment participation and whether it is the appropriate next step in the Respondent's treatment." CP 434.

On the community protection issue, she proposed the following instruction:

> When evaluating whether the Respondent's proposed less restrictive alternative plan is "adequate to protect to the community", you are to consider the individual aspects of the Respondent's release plan, rather than the Respondent himself. It is not necessary that all risk be removed in order for the proposed less restrictive alternative plan to be "adequate to protect the community."
> CP 435.

Ms. Page cited *Bergen* as the source for each instruction. CP 434, 435.

[5] See Bergen, 146 Wn.App. at 529-534.

The state objected to these proposed instructions, but did not provide alternative definitions. RP 964-965; CP 474-475.[6] The court mused that "some kind of instruction might be useful" to explain the community protection element. RP 965. However, the court did not provide a definition, other than to say that "[i]t is not necessary that all risk be removed." CP 671. The court did not provide any other instruction on the issue of adequate community protection, and did not define the best interests standard. CP 660-675.

During the closing argument to the jury, the state's attorney told jurors that they were responsible for defining the key terms: "because best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher." RP 1034.

The prosecutor also suggested that Mr. Urlacher was "grooming" jurors to get them to accept his proposed plan. RP 1040. Earlier, the judge had explicitly prohibited the state from asking Dr. Spizman if Mr. Urlacher was grooming the jury. RP 638.[7]

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[6] Unfortunately, there is no record of the parties' arguments or the court's analysis; the discussion occurred off the record. RP 957-958.

[7] The question originated with the jury. Questions for Witness from the Jury (filed 10/11/16), Supp. CP.

The jury entered a verdict in favor of the state, and the court ordered that Mr. Urlacher's confinement continue indefinitely. RP 1047-1053; CP 659, 676. Mr. Urlacher appealed. CP 679.

## ARGUMENT

### I. THE COURT'S INSTRUCTIONS AND THE PROSECUTOR'S ARGUMENT RELIEVED THE STATE OF ITS BURDEN TO PROVE ITS CASE.

Mr. Urlacher's release trial turned on whether his release plan (a) was in his "best interests" and (b) would "adequately to protect the community." RCW 71.09.094(2); CP 668, 672. The court did not define these phrases for the jury.[8] CP 660-675. The state's attorney told jurors they should "decide amongst yourselves" how to define them. RP 1034.

The court's instructions were not manifestly clear, and the state's argument compounded the problem.[9] A reasonable juror could have interpreted the instructions to deny release even if the state failed to meet its burden. This violated Mr. Urlacher's Fourteenth Amendment right to due process.

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[8] Other than to say that "[i]t is not necessary that all risk be removed in order for the proposed less restrictive alternative plan to be 'adequate to protect the community.'" CP 671.

[9] A separate prosecutorial misconduct argument is set forth below.

A. This court should review the instructions *de novo* to determine if they made the law manifestly clear.

1. Mr. Urlacher's constitutional arguments can be raised for the first time on appeal.

Mr. Urlacher proposed instructions defining critical terms, argued for their inclusion in the court's instructions, and objected to the court's refusal to give them. CP 434-435; RP (9/27/16) 94-98; RP 957-965. Although trial counsel does not appear to have made constitutional arguments supporting Mr. Urlacher's position, the constitutional errors are manifest, and can be raised for the first time on review. RAP 2.5(a)(3).

To raise a manifest constitutional error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014).[10] An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Trial counsel proposed instructions addressing the subject of Mr. Urlacher's due process argument. CP 434-435. Given what the trial court knew, it "could have corrected" the error by giving the proposed

[10] The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.*

instructions. *Id.* Mr. Urlacher's constitutional arguments can be raised for the first time on appeal. *Id.*

2. Applying a *de novo* standard, this court should determine if the instructions made the law manifestly clear to the average juror.

Constitutional issues are reviewed *de novo. State v. Armstrong*, ---Wn.2d---, 394 P.3d 373 (Wash. 2017). The same is true for issues of law and arguments regarding statutory interpretation. *Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG*, ---Wn.2d---, ___, 393 P.3d 748 (2017) (questions of law); *State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 1054 (2017) (issues of statutory interpretation).

A trial court's refusal to give proposed instructions is an issue of law subject to *de novo* review, even if based on the sufficiency of the evidence supporting the instruction. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016). The overall sufficiency of the instructions given is also an issue of law, reviewed *de novo*. *State v. Walker*, 182 Wn.2d 463, 481, 341 P.3d 976, 986 (2015), *cert. denied,* 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015).

Ordinarily, jury instructions are sufficient if they allow each side to argue its theory of the case, are not misleading, and (when read together) properly inform the jury of the applicable law. *Wilcox v. Basehore*, 187 Wn.2d 772, 782, 389 P.3d 531 (2017).

However, instead of applying this general standard, this court should use the heightened standard for instructional clarity drawn from criminal law. In criminal cases, instructions must make the relevant legal standard "manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (internal quotation marks and citations omitted). To determine whether an instruction is misleading, courts look at "the way a reasonable juror *could have* interpreted the instruction." *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

Conditional release alleviates the "massive"[11] deprivation of liberty inflicted by civil commitment. Because of this, both procedural and substantive due process require application of the *Kyllo* and *Miller* standards to conditional release trials such as Mr. Urlacher's.

3. Procedural due process requires a high standard of clarity for instructions in conditional release trials.

[11] *See In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) ("massive" deprivation of liberty requires narrow construction of statute).

Patients committed to the special commitment center have a protected liberty interest in conditional release.[12] *Bergen*, 146 Wn. App. at 527. Civil commitment procedures must comport with procedural due process. *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); U.S. Const. Amend. XIV. To avoid constitutional violations, trial courts should provide very clear instructions to juries considering conditional liberty for patients who have been civilly committed.

The process due under the Fourteenth Amendment depends on a balance of (1) the private interest affected by governmental action; (2) the risk of erroneous deprivation of that interest under current procedures; and (3) the government's interest, including any fiscal or administrative burden. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). The "procedure" at issue here is the standard of clarity for jury instructions in conditional release trials.

[12] *Bergen* is the only decision clarifying the "best interests" and community protection standards. It is a Court of Appeals decision. The Supreme Court has not had occasion to interpret the statutory language. In this brief, Appellant discusses *Bergen* in three different ways. First, Mr. Urlacher relies on the reasoning in *Bergen* to support his arguments relating to jury instructions and a challenge to the constitutionality of the statute. Second, Mr. Urlacher distinguishes *Bergen* by highlighting the differences between his arguments on instructional issues and those raised in *Bergen.* Third, Mr. Urlacher disputes *Bergen's* conclusion that the "best interests" standard is consistent with due process.

Procedural due process requires instructions that do more than allow each side to argue its theory of the case; the instructions must not merely fail to mislead or clear the low bar of "properly" informing the jury. *Wilcox*, 187 Wn.2d at 782. Instead, instructions must make the law "manifestly apparent" to the average juror, and preclude any possible misunderstandings by such a juror. *Kyllo*, 166 Wn.2d at 864; *Miller*, 131 Wn.2d at 90.

The individual interest weighs in favor of a high standard of clarity. Civil commitment involves a "massive" curtailment of liberty. *Hawkins*, 169 Wn.2d at 801. Patients have a significant interest in transitioning from total confinement—living in a secure island facility not unlike a prison—to a less restrictive alternative in a private apartment in the community. The first factor thus merits greater clarity in instructions, to ensure that the elements and the burden of proof are unmistakable.

The second factor supports the higher standards as well. Instructions may be clear "to the trained legal mind" without adequately communicating an important legal standard to the average juror. *State v. Fischer*, 23 Wn.App. 756, 759, 598 P.2d 742 (1979) (cited with approval by *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). Any miscommunication regarding the correct legal standard has the potential to

result in an erroneous finding, maintaining total confinement for a person who should be released to a less restrictive setting.

This potential for error supports the "manifestly apparent" standard in the criminal context. *See Kyllo,* 166 Wn.2d at 864; *see also State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). No lesser standard should apply in conditional release trials, where the massive curtailment of liberty is based on predictions of the future rather than on past criminal conduct.

Finally, the third factor also weighs heavily in favor of applying the higher standards for clarity here. The state has a "'compelling interest both in treating sex predators and protecting society from their actions.'" *In re Det. of Morgan*, 180 Wn.2d 312, 322, 330 P.3d 774 (2014) (quoting *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993)). This interest is furthered by jury instructions that clearly and unmistakably communicate the applicable law. Jurors who misinterpret their instructions may well authorize conditional release for a predator who should remain in total confinement.

The state's interest thus aligns with the interests of residents seeking conditional release. Furthermore, there are no financial or administrative costs associated with ensuring that jury instructions are manifestly clear and capable of only one (correct) interpretation.

All three *Mathews* factors favor application of a heightened standard of clarity for instructions in conditional release trials. *Mathews,* 424 U.S. at 335. Instructions must make the law "manifestly apparent" to the average juror. *Kyllo,* 166 Wn.2d at 864. Any reasonable juror, upon reading the instructions, must reach only one conclusion as to their meaning. *Miller*, 131 Wn.2d at 90.

4. Substantive due process requires a high standard of clarity for instructions in conditional release trials.

Substantive due process requires that civil commitment statutes be narrowly drawn to serve compelling state interests.[13] *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). The government must use the least restrictive means of meeting those compelling interests. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (applying strict scrutiny in the free speech context). Failure to use the least restrictive means renders a statute unconstitutional. *Id.; see also Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1011 (9th Cir. 2003); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 3320, 92 L.Ed.2d 728 (1986).

[13] The requirements of substantive due process are set forth at greater length below, in Mr. Urlacher's challenge to the constitutionality of the "best interests" standard.

Conditional release furthers this constitutional requirement: "'[m]ental health treatment, if it is to be anything other than a sham, must give the confined person the hope that if he gets well enough to be safely released, then he will be transferred to some less restrictive alternative.'" Lieb, R, "After Hendricks: Defining Constitutional Treatment for Washington State's Civil Commitment Program," Ann. N.Y. Acad. Sci. 989, p. 485 (2003)[14] (quoting *Turay v. Weston,* May 2000 Order, No. C91–664–WD (W.D.Wash.1994))

In conditional release cases, instructions that are not manifestly clear do not comport with substantive due process. If "a reasonable juror could have interpreted the instruction[s]" to relieve the state of its burden, the resident will remain in total confinement even if conditional release would meet the state's goals of ensuring public safety and providing treatment. *Miller*, 131 Wn.2d at 90.

Total confinement of a patient eligible for conditional release violates the patient's right to substantive due process. Total confinement of such a patient is not the least restrictive means of achieving the government's interests. *McCuistion*, 174 Wn.2d at 387; *see Playboy,* 529 U.S. at 813; *Right to Life,* 320 F.3d at 1011; *Wygant,* 476 U.S. at 280 n. 6.

[14] Available at: http://www.wsipp.wa.gov/Reports/93 (accessed 5/10/17).

Trials conducted with instructions that do not meet a high standard of clarity and thereby permit total confinement of residents who should be conditionally released are not narrowly tailored. *McCuistion*, 174 Wn.2d at 387. The higher standards for clarity used in criminal cases must apply in conditional release trials. Heightened standards for clarity will reduce the risk of error, ensuring that residents who can safely transition to less restrictive alternative placements do not remain in total confinement.

Substantive due process requires courts to provide instructions that make the law manifestly apparent to the average juror. *Kyllo,* 166 Wn.2d at 864. If "a reasonable juror could have interpreted" the court's instructions in a manner that denied conditional release to an eligible resident, a new trial must be granted. *Miller*, 131 Wn.2d at 90.

B. A reasonable juror could have interpreted the court's instructions to relieve the state of its burden to prove the "best interests" element.

In this case, the state had the burden of proving beyond a reasonable doubt that Mr. Urlacher's conditional release plan was not in his "best interests." RCW 71.09.090(3)(d). The *Bergen* court discussed the "best interests" standard at length. It concluded that the standard relates solely to treatment needs. *Bergen*, 146 Wn. App. at 528-529.

According to *Bergen,* the "best interests" language "relates to the SVP's successful treatment, ensuring that the LRA does not remove

'incentive for successful treatment participation' or 'distract[ ] committed persons from fully engaging in sex offender treatment' and is the 'appropriate next step in the person's treatment.'" *Id.,* at 529 (quoting Laws of 2005, Ch. 344 §1).[15]

This treatment-focused interpretation of "best interests" permitted the *Bergen* court to uphold the statute against a substantive due process challenge. *Id.,* at 529. According to the *Bergen* court the "'best interests' standard... is narrowly tailored to serve the State's compelling interest in appropriately *treating* dangerous sex offenders." *Id.* (emphasis added).

Here, the trial court did not define the phrase "best interests" for the jury. CP 660-675. Nothing in the instructions communicated the *Bergen* court's interpretation, or directed jurors to consider Mr. Urlacher's "best interests" in the context of his treatment needs.[16] CP 660-675. The

[15] The *Bergen* court interpreted the phrase "best interests" by resorting to the statement of legislative intent that accompanied the 2005 amendments to RCW 71.09.090. This was, at best, a questionable strategy, because "statements of legislative intent are irrelevant to a court's analysis when the statutory language is unambiguous." *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC LLC*, 169 Wn.2d 265, 270, 236 P.3d 193 (2010). The *Bergen* court decided that the phrase "best interests" is so unambiguous that jurors can understand its proper legal meaning even when it is presented in a vacuum. *Bergen,* 146 Wn. App. at 531-32. Thus, resort to the statement of legislative intent was likely improper. *Little Mountain Estates,* 169 Wn.2d at 270.

[16] The *Bergen* opinion suffers from significant internal tension. One portion of *Bergen* limits the meaning of "best interests" to comply with substantive due process; another portion indicates that this limited meaning need not be explained to the jury. *Bergen,* 146 Wn. App. at 527-532

instructions did not make the relevant legal standard "manifestly apparent to the average juror." *Kyllo,* 166 Wn.2d at 864.

Jurors had no way of knowing that the "best interests" element related specifically to Mr. Urlacher's interest in progressing to the "'appropriate next step in [his] treatment'" to achieve "successful treatment." *Id.,* at 528 (quoting Laws of 2005, Ch. 344 §1). At least some jurors "could have interpreted the instruction[s]" far more broadly than the *Bergen* court found constitutionally permissible. *Miller*, 131 Wn.2d at 90.

Mr. Urlacher's counsel urged the court to provide a definition drawn directly from the language in *Bergen.* The proposed instruction asked jurors "to consider whether the proposed [plan] properly incentivizes successful treatment participation and whether it is the appropriate next step in the Respondent's treatment." CP 456; *see Bergen,* 146 Wn. App. at 529. The court should have given the instruction; its refusal to do so meant the jury had no way of knowing that "best interests" relates to only to treatment, and not to Mr. Urlacher's general welfare.[17] RP 964-965.

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[17] The decision was made in chambers; the court did not explain its reasoning on the record. RP 964-965. The court apparently concluded that the proposed instruction was either unnecessary as a matter of law or a misstatement of the "best interests" standard. This presents an issue of law, reviewed *de novo. Xia*, ---Wn.2d at ___. *De novo* review is also required because Mr. Urlacher challenges the overall sufficiency of the instructions given. *Walker* I, 182 Wn.2d at 481. Review would be *de novo* even if the trial court had found the evidence insufficient to support the requested instructions. *Fisher*, 185 Wn.2d at 849.

The state took advantage of this in closing:

> [B]ecause best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher. RP 1034.

As the prosecutor suggested, jurors were left with no guidance as to how to interpret the "best interests" element. This failed to limit jurors' considerations to the relevant and correct legal issue: some jurors may have believed that Mr. Urlacher would be marginally happier in familiar surroundings and denied conditional release on that basis, others might have projected onto him their own desire to live on an island rather than in a city, while still others may have predicted that Mr. Urlacher's diet might be less nutritious if he lived on his own.

Even absent any link to Mr. Urlacher's dangerousness or his treatment needs, each of these beliefs would have justified a vote against conditional release. The state's improper argument encouraged this ad hoc approach. RP 1034.

The court's instructions permitted the jurors to rely on their own private idiosyncratic beliefs—on any topic whatsoever—when deciding what they thought would be best for Mr. Urlacher. This is the very problem that the *Bergen* court resolved when it found the "best interests" standard related to treatment, and thus was "narrowly tailored to serve the

State's compelling interest in appropriately treating dangerous sex offenders." *Bergen*, 146 Wn. App. at 529.

The instructions did not make the proper standard "manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864. Furthermore, the instructions were inadequate even under the more lenient general standard for clarity in jury instructions. *Wilcox*, 187 Wn.2d at 782. Under that standard, instructions must allow each side to argue its theory of the case, must not be misleading, and (when read together) must properly inform the jury of the applicable law. *Id.*

Here, the court's instructions did not satisfy any part of this test.

First, they did not allow Mr. Urlacher to argue his theory of the case—that his proposed plan was the appropriate next step in his treatment, even if it were not in his best interests in some other way. Second, the instructions were misleading because they allowed jurors to consider irrelevant factors when determining Mr. Urlacher's best interests. Third, they failed to inform the jury of the applicable law: without additional instructions, the jury had no way of knowing that "best interests" referred to Mr. Urlacher's treatment, rather than other aspects of his life. Thus, even under the more lenient standard for assessing instructional sufficiency, the instructions here are inadequate. *Id.*

The judiciary is tasked with interpreting the law. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007). Determining the meaning of a statutory provision is a judicial function; a trial court "cannot defer this decision to the jury." *State v. Kindell*, 181 Wn. App. 844, 851, 326 P.3d 876 (2014).

The trial court's instructions (and the state's closing argument) permitted jurors to provide their own definitions for the "best interests" standard and deny conditional release even if the state failed to meet its burden. This violated Mr. Urlacher's Fourteenth Amendment right to due process. *In re Det. of Turay*, 139 Wn.2d 379, 424, 986 P.2d 790, 813 (1999), *as amended on denial of reconsideration* (Dec. 22, 1999) (Turay II).

C. A reasonable juror could have interpreted the court's instructions to relieve the state of its burden to prove the community protection element.

The second alternative element required the state to prove beyond a reasonable doubt that the proposed plan did not "include conditions that would adequately protect the community." RCW 71.09.090(3)(d)(ii); RCW 71.09.094(2)(b); CP 668. The trial court did not further explain this element or define the phrase "adequately protect the community," other than to say that "[i]t is not necessary that all risk be removed" to meet the standard. CP 671.

The *Bergen* court addressed the meaning of the community protection element. *Bergen*, 146 Wn. App. at 533. A conditional release trial is premised on the likelihood that the patient will reoffend if unconditionally released. Thus, the community protection element turns on "whether the proposed LRA will prevent an otherwise-likely offense." *Bergen*, 146 Wn. App. at 533.

The jury's focus must be "on the plan, not the person." *Id.* It would be wrong for the jury to assess community safety by examining the detainee's "risk of re-offense rather than the sufficiency of the proposed LRA." *Id.,* at 534.

The court's instructions did not make this standard "manifestly apparent to the average juror." *Kyllo,* 166 Wn.2d at 864. A reasonable juror "could have interpreted the instruction[s]" to permit (or even require) consideration of Mr. Urlacher's specific risk of recidivism when evaluating the adequacy of community protection. *Miller*, 131 Wn.2d at 90. This is especially true given Dr. Goldberg's testimony. Dr. Goldberg's discussion of the plan's adequacy specifically referred to Mr. Urlacher's risk, as measured through actuarial instruments and clinical judgment. RP 290, 338-339. The state further compounded the problem by improperly inviting jurors to apply their own definition. RP 1034.

As with the "best interests" standard, nothing in the instructions relayed the *Bergen* court's understanding of the phrase. Jurors had no way of knowing that the community protection element required the state to prove the plan inadequate. Instead, jurors "could have"[18] believed the instructions allowed the state to meet its burden by proving that Mr. Urlacher had a high risk of recidivism, which is exactly the approach taken by Dr. Goldberg. RP 290, 338-339.

Mr. Urlacher asked the court to instruct jurors on the *Bergen* interpretation. His proposed instruction explained that the community protection element required the jury to "consider the individual aspects of the Respondent's release plan, rather than the Respondent himself." CP 457.[19] The court agreed that "some kind of instruction might be useful here," but refused to give the proposed instruction "because this is not approved." RP 965.

The trial judge should have given the proposed instruction.[20] His failure to do so left a gap in the instructions: jurors had no help in

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[18] Miller, 131 Wn.2d at 90.

[19] The court did adopt the second part of the proposed instruction, which explained that the plan need not eliminate all risk. CP 457, 671.

[20] As noted above, review of the court's refusal to give the instruction is *de novo,* whether based on a pure legal issue or on the sufficiency of the evidence supporting the instructions. *Xia*, ---Wn.2d at ___; *Walker* I, 182 Wn.2d at 481; *Fisher*, 185 Wn.2d at 849.

interpreting the community protection element. They "could have interpreted the instruction[s]"[21] to permit consideration of Mr. Urlacher's risk of predatory sexual violence when evaluating the state's proof on this element. *Bergen* forbids this.

Mr. Urlacher's risk level was not at issue: a resident seeking conditional release "does not challenge the finding that he meets the commitment criteria, including the fact that he is more likely than not to reoffend if released." *Bergen*, 146 Wn. App. at 533.

The court's instructions allowed jurors to deny conditional release absent proof that the plan provided inadequate protection to the community. If a juror believed that Mr. Urlacher's recidivism risk would unduly jeopardize community safety, that juror could find the state's evidence adequate without even considering "the sufficiency of the proposed LRA." *Id.,* at 534. The prosecutor encouraged this approach by suggesting that jurors make up and apply their own standard. RP 1034.

The instructions were constitutionally insufficient. *Kyllo,* 166 Wn.2d at 864; *Miller*, 131 Wn.2d at 90. The prosecutor's improper argument compounded the problem. Mr. Urlacher's case must be remanded for a new trial with proper instructions. *Id.*

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[21] Miller, 131 Wn.2d at 90.

D. The instructional errors and the state's argument violated Mr. Urlacher's Fourteenth Amendment right to due process, requiring reversal and remand for a new trial.

The instructional deficiencies violated due process in three ways.

First, due process "requires the State to bear the burden of proof in all civil commitment proceedings." *Turay* II , 139 Wn.2d at 424. This constitutional requirement applies to all phases of a civil commitment case. *Id.; see also Det. of Petersen v. State*, 145 Wn.2d 789, 795-96, 42 P.3d 952 (2002). Instructions that relieve the state of its burden violate due process. *State v. Reed*, 168 Wn. App. 553, 574, 278 P.3d 203 (2012) (addressing state's burden in criminal case). The court's instructions here relieved the state of its burden on both alternative elements, and thus violated Mr. Urlacher's right to due process. *Id.*

In addition, due process obligates the government to comply with the procedural requirements of Chapter 71.09 RCW. *In re Det. of Martin*, 163 Wn.2d 501, 511, 182 P.3d 951 (2008). Any failure to adhere to these procedural requirements violates the constitution. *Id.* (citing U.S. Const. Amend. XIV).

The failure to properly instruct the jury violated due process in the manner described by the *Martin* court. *Id.* The legislature has outlined the basic procedural requirements for a conditional release trial. The state must "prove beyond a reasonable doubt that conditional release to any

proposed less restrictive alternative either: (i) is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community." RCW 71.09.090(3)(d). The court must instruct the jury to return a verdict on each of these elements. RCW 71.09.090(2).

The court deviated from this statutory procedure by failing to properly instruct the jury. This allowed the state to evade its burden of proof and permitted the jury to return verdicts without understanding each element. The failure to strictly comply with the statutory procedure violated due process under *Martin*. *Id.*

Finally, the statutory provisions governing conditional release "dictate a particular outcome based on particular facts." *Bergen*, 146 Wn. App. at 527. This creates a constitutionally protected liberty interest in conditional release. *Id.* The failure to properly instruct the jury violated Mr. Urlacher's protected liberty interest by denying him the "particular outcome" he was entitled to if the jury believed the "particular facts" presented at trial. *Id.*

In the criminal context, "[i]t cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917

(1997). The same is true when a jury must guess at the meaning of the elements at a conditional release trial.

For all these reasons, the court's failure to properly instruct the jury violated Mr. Urlacher's Fourteenth Amendment right to due process. *Id.; Turay* II, 139 Wn.2d at 424; *Martin*, 163 Wn.2d at 511; *Bergen*, 146 Wn. App. at 527; *Addington*, 441 U.S. at 425. The prosecutor's improper argument compounded the problem. The trial court's order denying conditional release must be reversed and the case remanded for a new trial. *Smith*, 131 Wn.2d at 263; *Turay* II, 139 Wn.2d at 424; *Martin*, 163 Wn.2d at 511; *Bergen*, 146 Wn. App. at 527; *Addington*, 441 U.S. at 425.

Upon retrial, the court must instruct jurors that the "best interests" standard relates to Mr. Urlacher's potential for success in treatment, not to other aspects of his life. *Bergen*, 146 Wn. App. at 528.

The court must also instruct jurors that the community protection element relates to "the plan, not the person." *Id.,* at 533. The jury must determine "whether the proposed LRA will prevent an otherwise-likely offense," without considering Mr. Urlacher's uncontested risk of recidivism, which is not at issue in a conditional release trial. *Id.*

E. *Bergen* does not compel a different result; the *Bergen* court did not address the issues raised by Mr. Urlacher and did not apply the correct standard for clarity in jury instructions.

1. The *Bergen* court did not address the instructional issues raised by Mr. Urlacher.[22]

Mr. Urlacher argues that the court's instructions relieved the state of its burden and violated his right to due process. This issue was not raised or addressed in *Bergen. See Bergen*, 146 Wn. App. at 520-534. Accordingly, *Bergen* does not control here.

Mr. Urlacher also argues that the court should have accepted his proposed instructions explaining the "best interests" standard and the community protection element. CP 434-435. In *Bergen,* the appellant argued that the statute was unconstitutionally vague as applied because the court rejected a proposed instruction defining adequate community protection and failed to define either phrase for the jury. *Id.,* at 530-534.

[22] As noted earlier, *Bergen* is the only decision clarifying the "best interests" and community protection standards. It is a Court of Appeals decision. The Supreme Court has not had occasion to interpret the statutory language. In this brief, Appellant discusses *Bergen* in three different ways. First, Mr. Urlacher relies on the reasoning in *Bergen* to support his arguments relating to jury instructions and a challenge to the constitutionality of the statute. Second, Mr. Urlacher distinguishes *Bergen* by highlighting the differences between his arguments on instructional issues and those raised in *Bergen.* Third, Mr. Urlacher disputes *Bergen's* conclusion that the "best interests" standard is consistent with due process.

Mr. Urlacher does not make a vagueness argument. The *Bergen* court's resolution of the appellant's vagueness challenge does not control here.

Furthermore, *Bergen* did not deal with any proposed instructions defining best interests, and cannot control Mr. Urlacher's argument on that subject. Although the *Bergen* court did address an instruction defining "adequate community safety" (in the context of the appellant's vagueness challenge), the proposed instruction contained an error of law. *Id.,* at 533-534. The appellant there had asked the trial court to define adequate community safety to mean "that the LRA placement lowers the offender's risk to below 50 percent." *Id.,* at 534. This was incorrect; by seeking conditional release, Mr. Bergen did not "challenge the finding that he meets the commitment criteria," including "the fact that he is more likely than not to reoffend if released." *Id.*[23] The proposed instruction in *Bergen* incorrectly focused on the person, not the plan; it improperly told jurors that the community protection element "related to Bergen's risk of re-offense rather than the sufficiency of the proposed LRA." *Id.,* at 533-534.

Mr. Urlacher's proposed instruction does not suffer this flaw. CP 435. Instead, it is directly drawn from *Bergen,* and correctly states the law.

[23] The risk of re-offense is not at issue in a conditional release trial. Instead, the jury was to "assume[ ] that Bergen is likely to reoffend and [determine] whether the proposed LRA will prevent an otherwise-likely offense if he is released." *Id.*

The trial judge erred by refusing the proposed instruction, and *Bergen* does not suggest otherwise.

2. The *Bergen* court incorrectly concluded that the statutory language adequately conveys the relevant legal standard.

The standard for clarity in jury instructions is higher than the standard for statutes. *State v. Watkins*, 136 Wn. App. 240, 243, 148 P.3d 1112 (2006). A court "may resolve ambiguous wording in a statute by utilizing rules of construction, but jurors lack such interpretative [sic] tools." *Id.*

The *Bergen* court relied on interpretive tools to discern the meaning of the "best interests" and community protection elements. *Bergen*, 146 Wn. App. at 528-534. Most notably, the court examined the statement of legislative intent that accompanied the 2005 amendments to RCW 71.09.090. *Id.,* at 528, 531 (citing Laws of 2005, Ch. 344 §1). The court also relied on basic principles of statutory construction. *Id.,* at 534.

But juries do not have access to statements of legislative intent, tools of statutory construction, or other similar resources. Neither the *Bergen* jury nor the jury in this case had the opportunity to examine the civil commitment statute, the cases interpreting it, or even the context in which each phrase appears.

Most jurors lack familiarity with the legal background and underpinnings of civil commitment law. They are not aware of the constitutional limits set by the U.S. Supreme Court.[24] They cannot be expected to intuit the precise meaning of phrases whose definitions are constrained by the constitution, prior cases, or other statutory provisions. The *Bergen* court should have recognized that the statutory language is insufficient to convey the legal principles at issue in a conditional release trial.

By itself, the phrase "best interests" is not inherently limited to treatment-related considerations. The *Bergen* court imposed this limitation (and saved the statute from unconstitutionality) by referring to the statement of legislative intent. *Id.,* at 528-529.

Similarly, without engaging in statutory construction, a fair reading of the community protection element allows consideration of the risk of recidivism. The plain language does not require an exclusive focus on "the plan, not the person." *Id.,* at 533. *See* RCW 71.09.090(3)(d)(ii); RCW 71.09.094(2)(b); CP 668.

*Bergen* does not and should not control here. The *Bergen* court's blithe statements regarding the clarity of the statutory language are

[24] *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992); *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

undermined by its own resort to outside sources to interpret that same language.

Juries should not be denied the instructions they need to do their job. At a conditional release trial, jurors must be told the meaning of each element. Absent proper definitions consistent with the *Bergen* court's analysis, detainees who can safely receive treatment in the community will instead remain in total confinement in violation of their constitutional rights.

## II. THE STATE'S MISCONDUCT IN CLOSING REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL.

The right to a fair trial is a "fundamental liberty" secured by both the state and federal constitutions. *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Misconduct by a government attorney "may deprive a [person] of his constitutional right to a fair trial." *Id.,* at 703–04; *see also Walker* I, 182 Wn.2d at 475.

Appellate courts have applied the criminal standards for prosecutorial misconduct to civil commitment proceedings. *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *In re Det. of Law*, 146 Wn. App. 28, 50, 204 P.3d 230 (2008). Here, the state committed reversible misconduct in closing argument.

Reversal is required when there is a substantial likelihood that improper statements affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704. Misconduct that is flagrant and ill-intentioned requires reversal even absent an objection at trial. *Id.*

The state's attorneys committed misconduct that was flagrant and ill-intentioned. The trial court's order must be reversed and the case remanded for a new trial.

A. The state's attorneys caused incurable prejudice by inviting jurors to decide the case on an improper basis.

A prosecutor may not misstate the law of the case. *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). Doing so is "particularly egregious" misconduct, and "'is a serious irregularity having the grave potential to mislead the jury.'" *Id.* (quoting *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

Prior to trial, the state described *Bergen* as "settled law." CP 474. Under that case, the "best interests" element relates to a resident's treatment needs. 146 Wn. App. at 528. *Bergen* also made clear that the community protection element relates to "the plan, not the person." *Id.*, at 533. Jurors must decide "whether the proposed LRA will prevent an otherwise-likely offense;" this requires them to focus on "the sufficiency

of the proposed LRA" rather than the detainee's risk of re-offense. *Id.,* at 533-534.

Instead of urging the jury to return a verdict consistent with these principles, the state's attorney invited jurors to choose their own definitions for the "best interests" and community protection elements:

> [B]ecause best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher. RP 1034.

This misconduct was "particularly egregious." *Allen,* 182 Wn.2d at 380. It was especially deplorable because the state's attorneys fought to keep the jurors from hearing the *Bergen* definitions. CP 434-435; RP (9/27/16) 94-98; RP 957-965.

There is a substantial likelihood that the state's flagrant and ill-intentioned misconduct affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704. In the absence of instructions defining each element, the prosecutor's invitation to jurors—to formulate their own definitions—undoubtedly tipped the balance against Mr. Urlacher.

The order denying conditional release must be vacated and the case remanded for a new trial. *Allen*, 182 Wn.2d at 380.

B. The state's attorneys improperly appealed to passion and prejudice and introduced "facts" excluded by the trial judge by suggesting to jurors that Mr. Urlacher was attempting to "groom" them.

It is misconduct for a prosecutor to argue facts that have not been admitted into evidence. *In re Phelps*, 197 Wn. App. 653, 682, 389 P.3d 758 (2017). Nor may a prosecutor make arguments calculated to inflame the passions or prejudices of the jury. *State v. Thierry*, 190 Wn. App. 680, 690, 360 P.3d 940, 946 (2015), *review denied,* 185 Wn.2d 1015, 368 P.3d 171 (2016); *Glasmann,* 175 Wash.2d at 704.

Deliberate appeals to passion and prejudice constitute flagrant misconduct, requiring reversal even absent objection. *See State v. Belgarde*, 110 Wn.2d 504, 507–08, 755 P.2d 174 (1988); *State v. Hecht*, 179 Wn. App. 497, 507, 319 P.3d 836 (2014). Asking a jury "to place itself in the shoes of [a] victim[ ]" is an appeal to passion that can contribute to incurable prejudice. *State v. Pierce*, 169 Wn. App. 533, 537, 555-56, 280 P.3d 1158, 1161 (2012) .

In this case, the court explicitly refused to allow the state to ask Dr. Spizman if Mr. Urlacher was "grooming the jury" through his testimony.[25] RP 638. The question was not posed, and neither Dr. Spizman nor anyone else testified that Mr. Urlacher was grooming the jury.

[25] The question came from the jury in a written submission. Questions for Witness from the Jury (filed 10/11/16), Supp. CP.

Despite this, the prosecutor improperly appealed to the jury's passions and argued facts not in evidence by suggesting that Mr. Urlacher was grooming the jury:

> [Y]ou should not be fooled by Charles Urlacher. You should not be subject to his grooming…
> RP 1040.

Counsel for the state made this remark even though the court had specifically prohibited him from asking if Mr. Urlacher was grooming the jury through his testimony. RP 638; Questions for Witness from the Jury (filed 10/11/16), Supp. CP. The argument introduced "facts" not in evidence and improperly appealed to the jury's passions. *Phelps*, 197 Wn. App. at 682; *Thierry*, 190 Wn. App. at 690; *Glasmann,* 175 Wash.2d at 704; *Pierce*, 169 Wn. App. at 537, 555-56.

Although brief, the remark was enormously prejudicial. Evidence about grooming pervaded the trial. Mr. Urlacher referenced grooming numerous times in his testimony. RP 37, 57, 59, 64, 66, 68, 72, 74, 78, 88, 101. He admitted that he groomed his son's friends to offend against them. RP 57, 59, 63-64. Dr. Goldberg testified that the purpose of grooming is "to achieve child molestation." RP 212-213.[26] In closing argument, the

[26] Dr. Goldberg also testified that he found indications of grooming in Mr. Urlacher's records, and related his grooming activity to one of his dynamic risk factors (emotional congruence with children). RP 250, 263. Other witnesses also mentioned grooming briefly in testimony about treatment. RP 464, 631.

state's attorney told jurors that "Mr. Urlacher has been grooming people his whole life." RP 1028.

Because the record contained so much evidence relating to grooming, because Mr. Urlacher committed his crimes by grooming his victims, because the purpose of grooming is "to achieve child molestation,"[27] and because the prosecutor had already told jurors that Mr. Urlacher had spent "his whole life" grooming people,[28] the prosecutor's remark, although brief, caused enormous prejudice. In essence, the state invited jurors to imagine themselves as the future child victims of a sexual offense perpetrated by Mr. Urlacher.

References to sexual offending are inherently prejudicial. *State v. Bluford*, ---Wn.2d.---, ___, 393 P.3d 1219 (Wash. 2017) (addressing cross-admissibility of evidence for joinder purposes); *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (addressing admission of prior bad acts under ER 404(b)). This is especially true where the jury is tasked not with determining historical facts, but with predicting the future—including the future safety of the community.

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[27] RP 212-213.

[28] RP 1028.

Given the pervasive testimony about grooming "to achieve child molestation," the comment urged jurors to return a verdict based on passion and prejudice.

By putting jurors in the shoes of Mr. Urlacher's child victims, the state's attorney committed misconduct that was flagrant, ill-intentioned, and incurably prejudicial. *Glasmann*, 175 Wn.2d at 704. Even when considered by itself, the misconduct requires reversal. *Id.*

C. The cumulative effect of the prosecutor's misconduct deprived Mr. Urlacher of a fair trial.

The "cumulative effect" of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded,* 175 Wn.2d 1022, 295 P.3d 728 (2012) (Walker II).

Here, the prosecutor improperly argued facts that had not been admitted into evidence, appealed to jurors' passions and prejudices, and misstated the law, encouraging the jury to return a verdict based on impermissible factors. Whether considered individually or together, the improper arguments require reversal. *Walker* II, 164 Wn. App. at 737.

## III. THE "BEST INTERESTS" REQUIREMENT FOR CONDITIONAL RELEASE VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT IS NOT THE LEAST RESTRICTIVE MEANS OF TREATING PATIENTS AND PROTECTING THE PUBLIC.

Chapter 71.09 RCW forces some patients who have been civilly committed to remain in total confinement even if they can be safely and successfully treated in the community. The state can defeat an otherwise-perfect release plan by convincing jurors that it is somehow not in the detainee's "best interests." This paternalistic standard violates substantive due process.

### A. The state may not restrict constitutionally protected liberty interests to engineer improvements in a patient's general welfare.

The Fourteenth Amendment right to due process includes a substantive component. *Lawrence v. Texas*, 539 U.S. 558, 565, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This component has "fundamental significance in defining the rights of the person." *Lawrence,* 539 U.S. at 565. Substantive due process goes beyond mere procedural protections; it limits the government's ability to operate in certain realms. *Id,* at 578; *Troxel,* 530 U.S. at 65.

A statute can "create due process liberty interests where none would have otherwise existed." *Bergen*, 146 Wn. App. at 525. The

provisions of Chapter 71.09 RCW authorizing conditional release create such a constitutionally protected interest. *Id.,* at 527.

In analyzing these provisions, courts "apply strict scrutiny and determine whether the statutory procedures are narrowly tailored to serve a compelling state interest." *Id.* In the context of civil commitment, the state's compelling interest is in "treating sex predators and protecting society from their actions." *Young*, 122 Wn.2d at 26. If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative. *Playboy .,* 529 U.S. at 813 (applying strict scrutiny in the free speech context). Failure to use the least restrictive means renders a statute unconstitutional. *Id.; see also Right to Life*, 320 F.3d at 1011; *Wygant*, 476 U.S. at 280 n. 6.

Washington's conditional release scheme violates substantive due process. Statutory provisions deny conditional release to detainees who can be safely and successfully treated in the community if conditional release is not in their "best interests." RCW 71.09.094(2); *see also* RCW 71.09.090; RCW 71.09.096.

The "best interests" requirement is not the least restrictive means of meeting the government's compelling interest in "treating sex predators and protecting society from their actions." *Young*, 122 Wn.2d at 26. The "best interests" standard does not promote treatment or protect society.

Nor does it promote any compelling justification independent of treatment or protection.

There is no state objective that warrants forcing citizens to live in harmony with their best interests. *See O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493, 45 L. Ed. 2d 396 (1975) ("[T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.") Accordingly, the "best interests" standard cannot be part of a narrowly tailored statutory scheme.

The provisions governing conditional release are not the least restrictive means of meeting any compelling interest. *Playboy,* 529 U.S. at 813. They do not survive strict scrutiny, and thus violate substantive due process. *Id.; Right to Life*, 320 F.3d at 1011; *Wygant*, 476 U.S. at 280 n. 6.

Because the jury found for the state on both grounds, the due process violation does not require reversal. However, if the case is retried, Mr. Urlacher will be entitled to release unless the state proves that his LRA plan does not adequately protect the community. RCW 71.09.094(2)(b). His petition cannot be defeated based on the "best interests" standard.

B. This court should not follow Division I's opinion in *Bergen*; the *Bergen* court ignored fundamental rules of statutory construction

and improperly rewrote the provisions governing conditional release.[29]

The *Bergen* court upheld the conditional release scheme against a substantive due process challenge. *Bergen,* 146 Wn. App. at 529-30. According to the *Bergen* court, the phrase "best interests" means the detainee's interest in achieving success in treatment. *Id.*

There is nothing in the statute that supports this interpretation.

In interpreting a statute, the court's "fundamental objective is to ascertain and carry out the legislature's intent." *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 624-625, 278 P.3d 173 (2012). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen,* 153 Wn.2d 186, 194, 102 P.3d 789 (2004).

If a statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Broughton*, 174 Wn.2d at 627. The court may not add language to a clearly worded statute, even if it believes the legislature intended more. *Martin*, 163

[29] As noted earlier, and repeated here: *Bergen* is the only decision clarifying the "best interests" and community protection standards. It is a Court of Appeals decision. The Supreme Court has not had occasion to interpret the statutory language. In this brief, Appellant discusses *Bergen* in three different ways. First, Mr. Urlacher relies on the reasoning in *Bergen* to support his arguments relating to jury instructions and a challenge to the constitutionality of the statute. Second, Mr. Urlacher distinguishes *Bergen* by highlighting the differences between his arguments on instructional issues and those raised in *Bergen.* Third, Mr. Urlacher disputes *Bergen's* conclusion that the "best interests" standard is consistent with due process.

Wn.2d at 509. The judiciary may only correct inconsistencies that render a statute "entirely meaningless" or "*completely* ineffectual." *Id.*, at 512-513 (internal quotation marks and citation omitted) (emphasis in original).

Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad,* 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458,* 162 Wn.2d 196, 202, 172 P.3d 329 (2007).

The phrase "best interests" means "[f]or one's benefit or advantage." Dictionary.com Unabridged, Random House, Inc. (2017).[30] In other words, the statute requires that conditional release provide some general "benefit or advantage" to a detainee who is already receiving adequate treatment by a qualified provider, secure housing, department of corrections supervision, and "additional conditions necessary to ensure compliance with treatment and protect the community." RCW 71.09.092; RCW 71.09.094(2).

The "best interests" language is not ambiguous. It is broad and comprehensive, but it is not unclear. It requires jurors to consider a detainee's general welfare or well-being. RCW 71.09.094(2)(a). The "best

[30] Available at http://www.dictionary.com/browse/in-one-s-interest (Accessed June 6, 2017).

interests" provision violates substantive due process because it restricts liberty for reasons unrelated to treatment and public safety.

The *Bergen* court erroneously interpreted the provision to relate solely to treatment. *Id.,* at 528-529. It relied on a statement of legislative intent to reach this conclusion even though it did not find the "best interests" language ambiguous.[31] *Id.*, at 528. This was error: "statements of legislative intent are irrelevant to a court's analysis when the statutory language is unambiguous." *Little Mountain Estates Tenants Ass'n,* 169 Wn.2d at 270.

Nor can the *Bergen* court's interpretation be justified by the doctrine of constitutional avoidance. *State v. Strong*, 167 Wn. App. 206, 212, 272 P.3d 281 (2012). The doctrine permits courts to construe ambiguous statutory language to avoid serious constitutional doubts. *Id.*

The doctrine of constitutional avoidance does not apply to unambiguous language. *Id.* Furthermore, "[a]dopting a limiting construction is only appropriate if the statute is readily susceptible to the limiting construction; rewriting a law to conform it to constitutional requirements would constitute a serious invasion of the legislative domain." *Id.,* at 212–13; *see also Martin*, 163 Wn.2d at 512-513.

[31] In fact, the court found that the phrase was not unconstitutionally vague. *Id.,* at 530-531.

The legislature can enact a statute that conforms to the *Bergen* court's interpretation of "best interests." A narrowly tailored provision requiring proposed LRAs to support treatment success would likely survive a due process challenge.

But the legislature has not taken this step. The judiciary may not rewrite the "best interests" standard "to conform it to constitutional requirements." *Strong*, 167 Wn. App. at 212-213.

## IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

The Court of Appeals should decline to award appellate costs because Mr. Urlacher "does not have the current or likely future ability to pay such costs." RAP 14.2.[32] The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Urlacher indigent at the end of the proceedings in superior court. CP 677. That status is unlikely to change, given that he remains indefinitely confined to the SCC. The *Blazina* court

[32] Although RAP 14.2 uses the phrase "adult offender," it references RAP 15.2 ("Determination of Indigency and Rights of Indigent Party"), which specifically covers review at public expense in "commitment proceedings under RCW 71.05 and 71.09." RAP 15.2(b)(1)(C).

indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

## CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the Order Denying Conditional Release, invalidate the "best interests" requirement for patients seeking conditional release, and remand the case for a new trial. Upon retrial, the court must define the phrase "adequately protect the community" in accordance with *Bergen.* If the "best interests" standard is not invalidated, the trial court must define the phrase "best interests" in accordance with *Bergen.*

Alternatively, if the state substantially prevails, the court should decline to impose any appellate costs requested.

Respectfully submitted on June 16, 2017,

**BACKLUND AND MISTRY**

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

# CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Charles Urlacher
McNeil Island Special Commitment Ctr
P.O. Box 88600
Steilacoom, WA 98388

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Office of the Attorney General
Rose.McGillis@atg.wa.gov
crjsvpef@atg.wa.gov
fredw@atg.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 16, 2017.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

## BACKLUND & MISTRY

## June 16, 2017 - 3:05 PM

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